IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALFRED SICOLI, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
NABISCO BISCUIT COMPANY	:	NO. 96-6053

MEMORANDUM AND ORDER

HUTTON, J. June 8, 1998

Presently before the Court is the Defendant's Motion for Summary Judgment (Docket No. 22). For the reasons stated below, the defendant's motion is **GRANTED in part and DENIED in part**.

I. BACKGROUND

Taken in the light most favorable to the non-moving party, the facts are as follows. The plaintiff, Alfred Sicoli ("Sicoli"), was hired by the defendant, Nabisco Biscuit Company ("Nabisco"), on August 21, 1972, as a floor helper in Nabisco's Packaging Department. Pls.' Compl. ¶ 11. In 1974, the plaintiff "was transferred to a position as a Cartener," and, in 1982, the plaintiff was again "transferred to a position as Lineman." Id. As a Lineman, the plaintiff's duties included "maintaining cleanliness of the production line and supplying the production line." Id. ¶ 12.

Sometime in 1980, the plaintiff developed "severe migraines and severe cervical neck pain of which Defendant was aware," and which apparently caused the plaintiff to be absent from work on certain occasions. Id. ¶ 13. In June of 1994, Nabisco instituted a "No-Fault Attendance Policy" that governed disciplinary procedures resulting from Nabisco employees' absences from work. Id. ¶ 14. On November 4, 1994, the plaintiff "was suspended from work pursuant to that policy for taking time off to seek medical attention for physical complications directly related to Plaintiff's" medical condition, even though the plaintiff produced medical documentation explaining his absences. Id. ¶ 15.

When the plaintiff returned to work, he filed for "Family Medical Leave." Id. ¶ 16. Moreover, he requested that Nabisco "provide a reasonable accommodation for Plaintiff's injury." Id. Instead, the defendant placed the plaintiff "on a premium line that required very heavy lifting which . . . exacerbat[ed]" the plaintiff's injury, despite the fact that the defendant "knew or should have known that Plaintiff had only two absences left under the no-fault system before he was to be terminated." Id. ¶¶ 17, 18. On January 6, 1995, the defendant notified the plaintiff that he had been denied FMLA qualifying leave. Id. ¶ 19.

On February 6, 1995, the plaintiff "was placed on work-restrictions by [his treating physician,] Dr. Kimmel," who limited the plaintiff to "light-duty and no heavy lifting." Id. ¶ 20.[1] Instead of accommodating the plaintiff's restrictions, however, the defendant kept the "Plaintiff on the premium line," which caused "new symptoms in" the plaintiff's condition. Id. ¶ 21.

In April of 1995, the plaintiff "experienced extreme head and neck pain and numbness of the left side of his body." Id. ¶ 22. As a result, the defendant's company doctor, Dr. Lawrence Axelrod, instructed the defendant to change the plaintiff's "position from line-man to floor-duty." Id. "Defendant placed Plaintiff on full time floor duty," but this proved to be "too physically strenuous for Plaintiff." Id. ¶ 23. Although the plaintiff requested further accommodations, the defendant refused. Id. ¶¶ 23, 24. However, the plaintiff was later notified that he had been granted FMLA leave. Id. ¶ 25.

On September 4, 1996, the plaintiff initiated the instant action. In Count I, the plaintiff alleges that the defendant's actions violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq. In Count II, the plaintiff asserts that the defendant violated the Pennsylvania Human

1. The plaintiff states that "[h]eavy lifting was not and is not an essential function of Plaintiff's employment with Defendant." Pls.' Compl. ¶ 20.

Relations Act ("PHRA"), 43 Pa. Cons. Stat. Ann. §§ 951, et seq. In Count III, the plaintiff alleges that the defendant violated the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601, et seq. Finally, in Count IV, Plaintiff Carla Sicoli sets forth a loss of consortium claim against the defendant.[2] On April 1, 1998, the defendant filed the instant motion.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. Id. at 324. A genuine issue is one in which the evidence is such that a

2. The parties agree that Plaintiff Carla Sicoli's loss of consortium claim should be dismissed. Def.'s Mot. at 21; Pls.' Mot. at 16.

reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. Id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

B. Americans With Disabilities Act

Under the ADA, an employer is prohibited from discriminating against a "qualified individual with a disability, because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). A "qualified individual with a disability" is defined as "an individual with a disability, who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."

Id. § 12111(8).

"In order to make out a prima facie case under the ADA, a plaintiff must be able to establish that he or she (1) has a 'disability' (2) is a 'qualified individual' and (3) has suffered an adverse employment action because of that disability." Deane v. Pocono Med. Ctr., No. CIV.A.96-7174, 1998 WL 173100, at * 3 (3d Cir. Apr. 15, 1998) (citing Gaul v, Lucent Techs. Inc., 134 F.3d 576, 580 (3d Cir. 1998)). In the instant action, the defendant argues that (1) the plaintiff does not have a disability and (2) the defendant has made every reasonable effort to provide the plaintiff with a reasonable accommodation.

1. Is the Plaintiff "Disabled" Under the ADA?

The ADA defines a "disability" as "a physical . . . impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A) (emphasis added). "Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(I) (1997).[3] More specifically, "'[m]ajor life activities' are those basic activities that the average person in the general population can perform with little or no difficulty

3. "Because the ADA does not define many of the pertinent terms, we are guided by the Regulations issued by the Equal Employment Opportunity Commission ("EEOC") to implement Title I of the Act." Deane, 1998 WL 173100, at * 3 n.4 (citations omitted).

. . . includ[ing] sitting, standing, lifting, [and] reaching." 29 C.F.R. Pt. 1630, App. § 1630.2(I). The plaintiff alleges in his complaint that he is disabled because he is substantially limited in performing manual tasks, reaching, standing, lifting, taking care of himself, and working. Pls.' Compl. ¶ 28.

a. Substantially Limited in a Major Life Activity

"Whether an impairment substantially limits a major life activity depends on the following factors: (1) the nature and severity of the impairment, (2) the duration or expected duration of the impairment, and (3) the permanent or expected long term impact." Sherrod v. American Airlines, Inc., 132 F.3d 1112, 1119 (5th Cir. 1998) (citing 29 C.F.R. § 1630.2(j)(2)); Brown v. Lankenau Hosp., No. CIV.A.95-7829, 1997 WL 277354, at * 3 (E.D. Pa. May 19, 1997). "For an impairment to substantially limit major life activities, the impairment must be 'a significant restriction' on the major life activity." Taylor v. Phoenixville Sch. Dist., No. CIV.A.96-8470, 1998 WL 133628, at * 4 (E.D. Pa. Mar. 20, 1998) (quoting Nave v. Woolridge Constr., No. CIV.A.96-2891, 1997 WL 379174, at * 4 (E.D. Pa. June 30, 1997)). As the EEOC regulations explain:

> an impairment is substantially limiting if it significantly restricts the duration, manner or condition under which an individual can perform a particular major life activity as compared to the average person in the general population's ability to perform that same major life activity. Thus, for example, an

> individual who, because of an impairment, can only walk for very brief periods of time would be substantially limited in the major activity of walking. An individual who uses artificial legs would likewise be substantially limited in the major life activity of walking because the individual is unable to walk without the aid of prosthetic devices.

29 C.F.R. Pt. 1630, App. § 1630.2(j).

1) Manual Tasks; Taking Care of Himself

The plaintiff has failed to offer any evidence to demonstrate his alleged inability to complete manual tasks or to take care of himself. Accordingly, the defendant's motion must be granted in this respect.

2) Reaching, Standing and Lifting

As one district court recently stated:

> The EEOC regulations reflect the principle that the special protections of the ADA only be afforded to those individuals who have impairments that are severe when compared with those of the general population. This principle had been relied upon and articulated by the courts as well. See Kelly v. Drexel Univ., 94 F.3d 102 (3d Cir. 1996) (plaintiff who walked slowly and used a handrail when climbing stairs is not substantially limited in the major life activity of walking); see also Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986) ("It would debase th[e] high purpose [of the disability discrimination statutes] if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared.")

> There appears to be disagreement among the courts as to what type of lifting restrictions constitute substantial limitations on major life activities. See Williams v. Channel Master Satellite Sys., Inc., 101 F.3d 346 (4th Cir. 1996) ("[W]e hold, as a matter of law, that a twenty-five pound lifting limitation - particularly when compared to an average person's abilities - does not constitute a significant restriction on one's ability to lift, work, or perform any other major life activity."), cert. denied, 117 S. Ct. 1844 (1997); Aucutt v. Six Flags Over Mid-America, Inc., 85 F.3d 1311 (8th Cir. 1996) (same); Ray v. Glidden Co., 85 F.3d 227 (5th Cir. 1996) (same); but see Lowe v. Angelo's Italian Foods, Inc., 87 F.3d 1170 (10th Cir. 1996) (holding issue of fact exists as to disability of a woman with multiple sclerosis who could not lift more than 15 pounds, and should not even lift less than that, and who also faced limitations on her stooping and bending); Haysman v. Food Lion, Inc., 893 F. Supp. 1092 (S.D. Ga. 1995) (same, where plaintiff was limited to lifting 10-15 pounds, could only stand for 30 minutes and walk for 3 minutes); Cheatwood v. Roanoke Industries, 891 F. Supp. 1528 (N.D. Ala. 1995) (accepting plaintiff's statement that he was limited in the major life activities of lifting, where he could not lift more than 5 pounds without pain).
>
> The lack of uniformity notwithstanding, it is possible to discern from these cases that the uncertainty relates to lifting restrictions that are less than 25 pounds. The courts seem to agree lifting restrictions of 25 pounds or more are not significant . . . .

Mondzelewski v. Pathmark Stores, Inc., 976 F. Supp. 277, 279-80 (D. Del. 1997) (finding plaintiff's restriction from lifting 50 pounds or more and carrying 25 pounds or more was an insubstantial lifting restriction).

In the instant case, the plaintiff offers two reports to substantiate his ADA claim regarding his reaching, standing, and lifting limitations. On February 6, 1995, Dr. Douglas Kimmel examined the plaintiff and completed a Physical Capabilities Checklist. Def.'s Mot. Ex. I. Dr. Kimmel found that the plaintiff was unable to work eight hours each day. Id. Additionally, Dr. Kimmel discovered that in an eight hour day the plaintiff could stand, sit, walk, or drive for only three to five hours. Id. The plaintiff could not use his upper extremities for repetitive pushing or pulling, Dr. Kimmel opined, and the plaintiff also had trouble bending, climbing, reaching above his shoulders, and crawling. Id. Finally, Dr. Kimmel stated that the plaintiff could only perform light work that involved lifting or carrying. Id.

In a medical report performed by Innovative Healthcare Services on July 16, 1997, "tests revealed that . . . [the plaintiff] is able to lift 32 lbs. occasionally, 12 lbs. frequently from the chair to desk heights; 23 lbs. occasionally, 10 lbs. frequently for above shoulder heights, and 14 lbs. occasionally & frequently from the floor to chair heights.'" Def.'s Mot. Ex. I. Moreover, tests demonstrated that the plaintiff "is able to push 69 lbs. occasionally and pull 69 lbs. occasionally, 39 lbs. frequently; carry 17 lbs. occasionally for each arm, 8 lbs. frequently for the right." Id.

This Court finds that the plaintiff has met his burden of raising a material issue of fact concerning whether he is significantly restricted in a major life activity. More specifically, the plaintiff offers evidence which, if believed, shows that his reaching, standing, and lifting restrictions are substantial when compared with the general population. Based on the plaintiff's evidence, a reasonable jury could find that the plaintiff has physical impairments which substantially limit one or more of his major life activities. Accordingly, the defendant's motion is denied in this respect.

b. Ability to Perform the Major Life Activity of Working

"With respect to the major life activity of working . . . [t]he term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(I). Moreover, "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." Id. The EEOC Regulations further explain:

> Thus, an individual is not substantially limited in working just because he or she is unable to perform a particular job for one employer, or because he or she is unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent. For example, an individual who

> cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working. Nor would a professional baseball pitcher who develops a bad elbow and can no longer throw a baseball be considered substantially limited in the major life activity of working. In both of these examples, the individuals are not substantially limited in the ability to perform any other major life activity and, with regard to the major life activity of working, are only unable to perform either a particular specialized job or a narrow range of jobs.
>
> On the other hand, an individual does not have to be totally unable to work in order to be considered substantially limited in the major life activity of working. An individual is substantially limited in working if the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes, when compared with the ability of the average person with comparable qualifications to perform those same jobs. For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs. This would be so even if the individual were able to perform jobs in another class, e.g., the class of semi-skilled jobs . . . .

29 C.F.R. Pt. 1630, App. § 1630.2(j) (citations omitted).

In addition to the factors listed above, the following factors may also be considered when deciding whether a plaintiff is substantially limited in the major life activity of working:

> (A) The geographical area to which the individual has reasonable access;
>
> (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills, or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
>
> (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills, or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. § 1630.2(j).

In Taylor v. Phoenixville School District, the court addressed a plaintiff's burden under the ADA, where a plaintiff asserts that he has an impairment that substantially limits his ability to work. The court stated that, "[t]o make out such a claim, a plaintiff must present demographic information to show from what jobs in [his] geographic area plaintiff has been excluded due to [his] disability." Taylor, 1998 WL 133628, at * 6 (citations and footnote omitted). Moreover, the court found that, "'[a] plaintiff's failure to do so is fatal at summary judgment.'" Id. (quoting Soileau v. Guilford of Maine, Inc., 928 F. Supp. 37, 50 (D. Me. 1996), aff'd, 105 F.3d 12 (1st Cir. 1996); citing Nave, 1997 WL 379174, at * 7).

In the instant case, the plaintiff offers one additional report to substantiate his ADA claim regarding his limitations in the major life activity of working. On December 9, 1997, Jasen Walker, Ed.D., C.R.C., C.C.M., ("Walker"), performed a Vocational/Disability Evaluation Report regarding the plaintiff's limitations. After examining the plaintiff for three hours, Pls.' Mot. Ex. D. at 1, Walker found that the plaintiff's "residual physical capacities [were] commensurate with what is essentially light work." Id. at 8.[4] Moreover, Walker stated that the "packaging job or floor helper is obviously beyond [the plaintiff's] physical capabilities." Id.

Walker concluded that:

> Should Mr. Sicoli be displaced from his unionized job at NABISCO and remain relegated to the light work defined by his medical restrictions, he will experience a significant loss of income in alternative employment for which he remains qualified. Mr. Sicoli is essentially an unskilled and semi-skilled worker who has no real occupational experience of merit outside one particular factory. His left upper extremity limitations and neck pain would make it

4. Dr. Walker defined "light work" as:

> exerting up to 20 pounds of force occasionally, up to 10 pounds of force frequently, and/or a negligible amount of force constantly to move objects. . . . Even though the weight lifted may be only a negligible amount, a job should be rated light work when (1) it requires walking or standing to a significant degree; (2) it requires sitting most of the time, but entails pushing and/or pulling of arm or leg controls; and/or (3) it requires working at a production rate pace entailing constant pushing and/or pulling of materials even though the weight of those materials is negligible.

Pls.' Mot. Ex. D at 7.

> difficult, if not impossible, for him to secure other work. Should he be fortunate enough to do so, Mr. Sicoli's wages are likely to range from $5.15 to $8.50 per hour. . . . Mr. Sicoli will sustain a significant loss of wage potential and a measurable economic loss from losing his unionized benefits should he be displaced from NABISCO.
> . . . .
> Based on job descriptions made available with this referral, it would appear that there are positions within his job classification at NABISCO that he could perform, and the job requirements of those positions would not compromise the medical restrictions placed upon him.

Pls.' Mot. Ex. D at 9 (emphasis added).

In the instant action, the plaintiff has shown that he is "significantly restricted in the ability to perform [both] a class of jobs [and] a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities." 29 C.F.R. § 1630.2(j)(3)(I). The plaintiff has "present[ed] demographic information to show from what jobs in [his] geographic area plaintiff has been excluded due to [his] disability." Taylor, 1998 WL 133628, at * 6 (citations and footnote omitted). Moreover, the plaintiff offers evidence that he is limited to "light work," that he can no longer perform the duties required of a floor helper, and that he would have difficulty finding a job with a different employer. Pls.' Mot. at 6, 7.[5] Thus, the defendant's motion is denied with

5. As a floor helper, an employee is required to lift weights from 20 pounds to seventy pounds from the floor to the height of the employee's head.
(continued...)

respect to the plaintiff's claim that he is disabled because he is substantially limited in working.

2. Is the Plaintiff Regarded as Disabled Under the ADA?

The ADA further provides that an individual suffers from a "disability" if he is "regarded as having such an impairment." 42 U.S.C. § 12102(2)(C). "The focus of such an inquiry is not on the plaintiff's actual abilities but instead, is 'on the reactions and perceptions of the persons interacting or working with [the plaintiff].'" Taylor, 1998 WL 133628, at * 7 (quoting Kelly, 94 F.3d at 108-09)). The plaintiff alleges in his complaint that he is disabled because "he is regarded by Defendant as having a disability as a result of his medical condition which substantially limits or impairs . . . his major life activities including . . . performing manual tasks, reaching, standing for long periods of time, taking care of himself, and working." Pls.' Compl. ¶ 29.

> Under Section 12102(2)(C),
>
> a plaintiff would be entitled to the protection of the ADA even if he does not actually have a substantially limiting impairment, as long as he can show that defendants regarded him as having such an impairment. See 29 C.F.R. § 1630.2(l).

(...continued)
Moreover, a floor helper must carry weights ranging between 40 and 70 pounds. A floor helper is also required to push or pull weights of 40 to 60 pounds. Finally, a floor helper is frequently required to stand, and occasionally required to sit, walk, climb, stoop, crouch, twist, and reach from the floor to over one's head. Def.'s Mot. Ex. J.

> Where, as here, defendants concede that plaintiff has an impairment, plaintiff must still show that defendants perceived his impairment to be one which posed a substantial limitation on one of his major life activities. See, e.g., Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986). The mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that the perception caused the adverse employment action. Kelly v. Drexel Univ., 94 F.3d 102, 109 (3d Cir. 1996).

Nave, 1997 WL 379174, at *8.

The plaintiff's argument that he was "regarded as" disabled is meritless. First, the plaintiff fails to offer any evidence that the defendant misperceived his disability. See Deane, 1998 WL 173100, at * 4. Second, the plaintiff has not demonstrated that the defendant regarded him as substantially limited in any major life activities, including working. Id. at 5. In fact, it appears as though the parties agree as to the extent of the plaintiff's limitations. Pls.' Mot. at 5. Thus, the defendant's motion is granted with respect to the plaintiff's "regarded as" disabled claim.

3. Has the Defendant Provided a Reasonable Accommodation?

The second element of a prima facie case under the ADA requires the plaintiff to show that he "is a 'qualified individual.'" Deane, 1998 WL 173100, at * 3 (citing Gaul, 134 F.3d at 580). "A two-part test is used to determine whether

someone is a 'qualified individual with a disability.'" Gaul, 134 F.3d at 580 (quoting 29 C.F.R. pt. 1630, App. at 353-54). "[A] court must [first] consider whether the 'individual satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc.'" Gaul, 134 F.3d at 580 (quoting 29 C.F.R. pt. 1630, App. at 353). Next, "the court must consider 'whether or not the individual can perform the essential functions of the position held or desired, with or without reasonable accommodation.' [29 C.F.R. pt. 1630, App. at 353.] 'The determination of whether an individual with a disability is qualified is made at the time of the employment decision.'" Gaul, 134 F.3d at 580 (quoting 29 C.F.R. pt. 1630, App. at 353).

a. Reasonable Accommodation at Plaintiff's Current Position

In the instant action, the parties agree that the plaintiff possessed the prerequisites for the position of modified Floor Helper.[6] Moreover, the defendant does not argue that the plaintiff is unable to perform the essential functions of his job with or without reasonable accommodation. Instead,

6. Although the floor helper position requires an employee to perform various physical tasks, the defendant agrees that it allowed for modifications of these tasks based on an employee's physical abilities. Fillman Dep. at 23; Def.'s Mot. Ex. J. In fact, the job description offered by the defendant states that, "[a]ssistance is available for any heavy lifting or carrying." Def.'s Mot. Ex. J. Moreover, a floor helper's "[d]uties may vary widely depending on assignment . . . . Specific assignments may result in less physically demanding requirements." Id.

the issue at hand is whether the defendant violated the ADA by requiring the plaintiff to perform tasks beyond those required by a modified Floor Helper, which the plaintiff was unable to accomplish due to his physical limitations.

The defendant contends that it "does not require [the plaintiff] to maneuver any objects which he feels are beyond his restrictions. Instead, [the plaintiff] uses a transporter, which is a motorized device which lifts heavy objects." Def.'s Reply Mem. at 9. The defendant further asserts that the plaintiff is permitted to seek assistance from his co-workers or supervisors. Id. Finally, the defendant claims that the plaintiff utilizes the transporter and retains the help of his co-workers frequently, and, in the event that these resources are unavailable, the plaintiff "may refrain from performing the task." Id. at 10.

The plaintiff, however, argues that the defendant has failed to provide the modifications he requires. Pls.' Mot. at 10. More specifically, the plaintiff states that the defendant has asked him to perform tasks beyond his physical capabilities, without the assistance of the transporter or his fellow workers. Id. at 10; Sicoli Dep. of 8/22/97 at 162, 164, 165; Sicoli Aff. at ¶¶ 3, 4, 6. The plaintiff asserts that he has completed these assignments, although these tasks exceeded his medical restrictions. Sicoli Aff. ¶ 5. Finally, the plaintiff states

that the defendant never informed him that he was permitted to ask his fellow employees for assistance. Sicoli Aff. ¶ 4.

At this stage, a court must draw all reasonable inferences in the light most favorable to the nonmovant. Big Apple BMW, Inc., 974 F.2d at 1363. Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment. Id. Thus, this Court must accept the plaintiff's factual assertions as true. The plaintiff offers evidence that the defendant has required the plaintiff to perform tasks beyond his medical restrictions, although these assignments were not essential to his job as a modified Floor Helper. The plaintiff "has [therefore] demonstrated a genuine issue of material fact regarding his ability to perform the essential functions with reasonable accommodation." Gaul, 134 F.3d at 580 (citing White v. York Int'l Corp., 45 F.3d 357, 362 (10th Cir. 1995)). Accordingly, the defendant's motion must be denied in this respect.

b. Transfer to a Different Position

The plaintiff also argues that the defendant violated the ADA by failing to reassign the plaintiff to another position. To succeed under this theory, a plaintiff must:

> "demonstrate that there were vacant, funded positions whose essential duties he was capable of performing, with or without reasonable accommodation, and that these positions were at an equivalent level or

> position as [his former job]." Shiring [v. Runyon, 90 F.3d 827, 832 (3d Cir. 1996)]. [The plaintiff] must also demonstrate as part of his facial showing that the costs associated with his proposed accommodation "are not clearly disproportionate to the benefits that it will produce." Borkowski v. Valley Cent. School Dist., 63 F.3d 131, 138 (2d Cir. 1995). The term "costs" includes financial as well as administrative burdens on a company. Cf. School Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 287 n.17 (1987). If [the plaintiff] is able to make out a prima facie showing, "the defendant then bears the burden of proving, as an affirmative defense, that the accommodations requested by the plaintiff are unreasonable, or would cause an undue hardship on the employer." Shiring, 90 F.3d at 831.

Gaul, 134 F.3d at 580-81.

In the instant action, the plaintiff has failed to meet his burden, because he has not shown that "'there were vacant, funded positions whose essential duties he was capable of performing, with or without reasonable accommodation, and that these positions were at an equivalent level or position as [his former job].'" Gaul, 134 F.3d at 580 (quoting Shiring, 90 F.3d at 832). The plaintiff merely states that he "bid for the position of Processor in the baking department," and that he "believe[s] that this job is less physically exertional than [his] present job." Sicoli Aff. ¶ 9. However, the plaintiff fails to show that this position is vacant or that it is at an equivalent level as his current job. Most importantly, the plaintiff fails to offer any evidence that he can perform the

essential functions of a Processor. Accordingly, the defendant's motion is granted in this respect.

C. Pennsylvania Human Relations Act

1. Exhaustion of Administrative Remedies Under the PHRA

The defendant argues that because the plaintiff failed to seek timely administrative remedies prior to filing this action, it is entitled to summary judgment with respect to the plaintiff's PHRA claims. The PHRA requires an employee to pursue administrative remedies prior to filing a lawsuit alleging discrimination. 43 Pa. Cons. Stat. Ann. §§ 951 et seq.; Clay v. Advanced Computer Applications, 559 A.2d 917, 919 (Pa. 1989). In Clay, the Pennsylvania Supreme Court stated that "allowing a discharged employee to commence an action in the courts without first exhausting administrative remedies would be logically inconsistent with the legislatures having created the PHRC [Pennsylvania Human Relations Commission] to function as an efficient mechanism for handling such disputes." Clay, 559 A.2d at 919. Additionally, the Act requires that "any complaint must be filed within 180 days after the alleged act of discrimination . . . ." 43 Pa. Cons. Stat. Ann. § 959(h).

The defendant states that the 180 day period began on October 31, 1995, because "[i]n the body of [the plaintiff's PHRC] complaint of discrimination, [the plaintiff] alleges discrimination only through October of 1995." Def.'s Mot. at 11, n.14. In response, the plaintiff "concedes that his filing with the PHRC was not within 180 days of the last discriminatory act"

explicitly alleged in the complaint. Pls.' Mot. at 3. "[N]onetheless," the plaintiff asserts that "a reasonable investigation of his complaint would have revealed the continuing nature of the discriminatory conduct." Id.

The plaintiff does not state a claim of discrete incidents of discrimination, but rather offers proof of a continuing pattern of violations. The plaintiff states that "he continues to be denied reasonable accommodation, in that he [has been] denied assistance in performing those tasks which exceed his medical restrictions and job description." Def.'s Mot. at 3-4 (citing Sicoli Dep. of 2/23/98 at 273; Sicoli Aff. ¶¶ 3-8). The plaintiff alleges violations of a continuing nature, which he may prove persisted until within 180 days of the filing date. See West v. Philadelphia Elec. Co., 45 F.3d 744, 755-57 (3d Cir. 1995); Lesko v. Clark Publisher Servs., 904 F. Supp. 415, 419 (M.D. Pa. 1995).

To establish that a claim falls within the continuing violations theory, a plaintiff must prove: (1) that at least one act occurred within the filing period, and (2) "that the harassment is more than the occurrence of isolated or sporadic acts of intentional discrimination." Id. at 755. In making the second assessment, the Court must consider factors such as:

> (I) subject matter-whether the violations constitute the same type of discrimination; (ii) frequency; and (iii) permanence--whether the nature of the violations should trigger

> the employee's awareness of the need to assert her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate.

Id. n.9. If the plaintiff is able to make out a proof of a continuing violation, as long as one event in the sequence occurs within the statutory period, the plaintiff may offer evidence of, and recover for, the entire continuing violation. Id. at 755.

The plaintiff easily satisfies the requirement of a present violation with his deposition testimony, wherein the plaintiff states that the defendant continues to fail to reasonably accommodate him. The plaintiff also satisfies the second requirement: that the alleged violations were all part of the same on-going pattern of discrimination. All of the plaintiff's claims concern his inability to complete certain job tasks that are not essential to his job, and the defendant's alleged failure to modify the plaintiff's job duties. Therefore, the Court is satisfied that the plaintiff offers sufficient facts to invoke the continuing violation doctrine, and to support his claim that he filed his administrative charge within the applicable 180 day filing period.

2. Plaintiff's Claims Under the PHRA

Court "generally interpret the PHRA in accord with its federal counterparts." Kelly, 94 F.3d at 105 (citations omitted). "[A]ny analysis applied to the ADA claim applies

equally to the PHRA claim." Matczak v. Frankford Candy and Chocolate Co., 136 F.3d 933, 935 n.1 (3d Cir. 1997) (citing Kelly, 94 F.3d at 105). Accordingly, this Court grants in part and denies in part the defendant's motion with respect to the plaintiff's PHRA claims to the same extent that this Court grants in part and denies in part the defendant's motion with regard to the plaintiff's ADA claims.

D. The Family and Medical Leave Act

Congress enacted the Family Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601 et seq., in order to afford individuals up to 12 weeks of unpaid medical leave per year. See 29 U.S.C. § 2612(a)(1).[7] The FMLA applies to individuals with "a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D).

1. Initial Denial

"An employer may require that a request for leave under [Section 2612(a)(1)(D)] be supported by a certification issued by the health care provider of the eligible employee." 29 U.S.C. § 2613(a). Such a certification is sufficient under Section 2612(a)(1)(D) if includes: "(1) the date on which the serious

7. The FMLA applies only to "eligible employee[s]." See 29 U.S.C. § 2611(2) & (4). The defendant does not contend that the plaintiff is not an eligible employee under the FMLA.

health condition commenced; (2) the probable duration of the condition; (3) the appropriate medical facts within the knowledge of the health care provider regarding the condition; . . . [and] (4)(B) . . . a statement that the employee is unable to perform the functions of the position of the employee." 29 U.S.C. § 2613(b); see 29 C.F.R. § 825.306. "Where the employee provides the employer with a reason for his absence that the employer, based on the physician's certification, knows is not 'qualifying,' the Act and the regulations place no obligation on the employer to grant the employee FMLA leave." Stoops v. One Call Communications, Inc., No. CIV.A.97-1895, 1998 WL 142297, * 4 (7th Cir. Mar. 31, 1998).

In the instant case, the gravamen of plaintiff's FMLA claim is that the defendant improperly denied plaintiff's initial request for FMLA leave. On December 1, 1994, the plaintiff applied for a FMLA leave of absence, asserting that his migraines were a serious health condition that made him unable to perform the functions of his position. Sicoli Dep. of 2/23/98 Ex. 11. In support of his application, the plaintiff submitted a certification from Dr. Kimmel, his treating physician. Id. Dr. Kimmel found that the plaintiff suffered from headaches, and that there were early degenerative changes in his cervical spine, but Dr. Kimmel was uncertain as to the probable duration of the plaintiff's condition. Id. Although Dr. Kimmel stated that the

plaintiff might get sudden headaches, Dr. Kimmel determined that the plaintiff was able to perform the functions of his position. Id.

"Where an employer properly requests a physician's certification under the FMLA and that certification indicates the employee is not entitled to FMLA leave, the employer does not violate the FMLA by relying upon that certification in the absence of some overriding medical evidence." Stoops, 1998 WL 142297, at * 5. In the instant action, the defendant received the certification of the plaintiff's doctor, which clearly stated that the plaintiff was not entitled to FMLA leave because he could perform the functions of his job. Accordingly, the defendant properly denied the plaintiff's initial request. The plaintiff has failed to offer any evidence that the defendant's decision was improper. Thus, this Court grants the defendant's motion to the extent the plaintiff's FMLA claim is based on the defendant's initial denial of the plaintiff's request.

2. Delay Prior to Subsequent Approval

The plaintiff further claims that the defendant acted improperly when it waited until January 26, 1995, to request that the plaintiff seek a second opinion, with Dr. Ramon Manon Espaillat. Pls.' Mot. at 15. After conducting a neurological exam, Dr. Espaillat found that the plaintiff suffered from migraine headaches, but did not explicitly state that the

plaintiff could not perform the functions of his job. Def.'s Mot. Ex. E. However, the defendant approved the plaintiff's request for FMLA leave based on Dr. Espaillat's findings. Def.'s Mot. at 21.

"Where an employer . . . requests from the employee and receives a physician's certification that indicates that an employee's serious health condition does not require him to miss work, the employer may rely on that certification until the employee provides a contradictory medical opinion." Stoops, 1998 WL 142297, at * 4 (emphasis added). In the present case, the defendant was justified in relying on Dr. Kimmel's report that the plaintiff's leave was not FLMA-qualifying. The defendant was not required to request that the plaintiff consult a second doctor after the plaintiff's own treating physician found that the plaintiff was able to continue working. Id. Instead, the plaintiff had the burden to seek another medical opinion if the plaintiff still sought FMLA leave. See id. ("FMLA circumscribes the employer's right to challenge a physician's certification that leave is FMLA-qualifying, . . . but nothing in the Act or regulations limits the employee's ability to produce a medical opinion that contradicts a prior negative certification originally provided by the employee."). Accordingly, this Court finds that the defendant did not act improperly by failing to promptly recommend that the plaintiff seek a second opinion.

3. Defendant's Contact with Dr. Espaillat

Finally, the plaintiff argues that "a factual issue exists with respect to whether Dr. Espaillat . . . was regularly contracted or utilized by Defendant." Id. at 16. The FMLA allows an employer to require its employee to seek a second opinion, if the employer doubts the validity of a medical certification stating that the employee's leave is FMLA-qualifying. See Sims v. Alameda-Contra Costa Deficit Dist., No. CIV.A.96-2244, 1998 WL 208823, at * 1 (N.D. Cal. Apr. 9, 1998) (citing 29 U.S.C. § 2613(c)).[8] If the employer requests that the employee seek a second opinion, 29 C.F.R. § 825.307(b) states that: "The employer may not regularly contract with or otherwise regularly utilize the service of the health care provider furnishing the second opinion."

The plaintiff argues that there is a genuine issue of material fact "with respect to whether Dr. Espaillat . . . was regularly contracted or utilized by Defendant." Pls.' Mot. at 16. As explained above, the FMLA required the plaintiff, not the defendant, to obtain a medical opinion to contradict Dr. Kimmel's prior negative certification. Stoops, 1998 WL 142297, at * 4. This situation is distinguishable from the one envisioned in 29

8. In fact, "[i]f the second medical opinion differs from the first medical opinion, the employer 'may' require the employee to obtain a third medical opinion. 29 U.S.C. § 2613(d)(1). The third medical opinion 'shall' be binding. 29 U.S.C. § 2613(d)(2)." Sims, 1998 WL 208823, at * 1.

C.F.R. § 825.307(b), because the plaintiff, not the defendant, challenged the validity of the first opinion. Accordingly, the defendant's prior contact with Dr. Espaillat is inconsequential, especially because the defendant granted the plaintiff's request after reviewing Dr. Espaillat's report. Thus, the defendant's motion is granted with respect to the plaintiff's FLMA claim.

E. Loss of Consortium

The parties agree that the loss of consortium claim should be dismissed. See, supra, n.2. Thus, the defendant's motion is granted with respect to plaintiff Carla Sicoli's loss of consortium claim.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALFRED SICOLI, ET AL.	:	CIVIL ACTION
	:	
v.	:	
	:	
NABISCO BISCUIT COMPANY	:	NO. 96-6053

O R D E R

AND NOW, this 8th day of June, 1998, upon consideration of Defendant's Motion for Summary Judgment (Docket No. 22), IT IS HEREBY ORDERED that the Defendant's Motion is **GRANTED in part and DENIED in part**.

IT IS FURTHER ORDERED that:

1) the Defendant's Motion is denied as it relates to Counts I and II of the Plaintiff's Complaint; and

2) the Defendant's Motion is granted as it relates to Counts III and IV of the Plaintiff's Complaint.

BY THE COURT:

_____
HERBERT J. HUTTON, J.